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## Pro Se

A few self-serving remarks offered as part of the res gestae on this occasion—beginning Volume 100

The **Central Law Journal**, established in 1874, is unique among legal publications. It is the oldest weekly law journal in the United States, has a national circulation (many foreign subscribers, too), and is independent—not controlled nor supported by any particular bar association, school or advertiser. Its subscribers are almost exclusively lawyers actively engaged in practice. That it has continued through ninety-nine volumes is due entirely to the benefit they have derived from it, and it is for them, and them alone, that it is published. Among recent letters inclosing payment for subscriptions were some from old subscribers:

Mr. Fred H. Peterson of Seattle, Wash., on December 2nd, wrote us:

I have been reading the Journal since 1883, which is nearly 44 years, and it has always been a favorite of mine because of its frequent arrival and its instructive comments on important litigation and decisions. Likewise, the leading articles have often been of great value professionally as well as entertaining.

Mr. Thomas Z. Lee of Providence, R. I., who has been a subscriber during the entire thirty-eight years of his practice, in a letter of December 10th says:

Many legal magazines come to my attention, but of none of them am I so fond as the **Central Law Journal**. I read it from cover to cover, though I must confess I do not give this good treatment to all the legal publications that come to my attention. I am active in practice and can do a better day's work today than when I first became a subscriber; in fact, I am very certain that my contact with the **Central Law Journal** has kept me young.

From Mr. Claude Payton of Miami, Fla., we have a letter of December 24th, saying:

I am handing you check this day, being Christmas Eve, for the year's subscription, and I feel that it is about the best value I get for any money spent for any reading matter.

Letters such as these, and we mention only a few of the most recent ones, indicating that the **Journal** is serving its purpose, gladden the editorial heart, you may be sure. We have many old subscribers—in fact there are three who have been with us ever since the **Journal** was established! Perhaps, as Mr. Lee suggests, *supra*, it keeps them young—we hope so, but cannot veraciously guarantee it. Now, about the future.

### WEEKLY ISSUE

We are elated to learn that the resumption of weekly publication, after the short period as a semi-monthly, has met with general and emphatic approval by our subscribers. One of the commendatory letters is that of December 29th, from Mr. Arthur F. Kingdon of Bluefield, W. Va., who says:

In conclusion I desire again to say that I am particularly pleased to note that you have returned to the weekly basis. . . . When these publications come in weekly they are of such a size as permits thorough reading. When they are allowed to run monthly they are not read, in my experience, as thoroughly as when published weekly.

## NON-BINDING PROMISES AS CONSIDERATION\*

In thousands of cases it has been dogmatically stated that both parties to a contract must be bound or neither is bound. So convincing was this dictum that it has been a painfully slow process to re-introduce to the legal profession the unilateral contract—the only kind of contract that our ancestors knew a few centuries ago. It is still generally believed, even by those who well understand the unilateral contract, that the dictum is quite correct with respect to bilateral contracts; and the suggestion of Professor Oliphant that this may never be so came as a surprise. Everyone had known, indeed, that the dictum did not fully apply to contracts between an infant and an adult, contracts within the Statute of Frauds signed by one party only, and contracts induced by the fraud of one party; but it was loosely supposed that these cases could be harmonized with the dictum by use of the magic words “voidable” and “unenforceable.” Both parties were “bound;” but one had the power of avoidance of the whole, upon the exercise of which neither was bound. It can easily be shown that this analysis is unsound in very many cases,<sup>1</sup> and we must admit that the dictum is subject to many clear exceptions. Have the exceptions, in this case as in so many others, come to occupy the whole field?

The present writer is not yet ready to abandon the dictum altogether; but he is

\*—This article appeared in the *Columbia Law Review*, Vol. XXVI, No. 5, and is reprinted by permission. The author is Arthur L. Corbin, A.B., 1894, University of Kansas; LL.B., 1899; M.A., 1909, Yale. Author of *Cases on Contracts* (1909); editor of *Anson, Contracts* (1919). Professor of Law in the Yale Law School.

(1) In the case of a wholly executory bilateral contract whereby an infant promises to render service and the adult promises payment after full performance, it is no breach of legal duty for the infant to fail to perform. Even in the absence of any disaffirmance, a complaint alleging all the facts would be demurrable. The same is true of a wholly executory bilateral contract induced by the fraud of one of the parties. In an action for breach the defendant can successfully plead the plaintiff's fraud, without showing any notice or other act of disaffirmance or rescission by himself. The existing facts created no duty in him. *Roberts v. James* (1912) 83 N. J. L. 492. Yet in such cases, the defendant could have enforced the contract against the plaintiff.

thoroughly convinced that its correctness as a rule of law cannot be established by any mere deductive process based upon some more ancient and general rule of law. It can be established only by a collection of decisions in point; or, if we are willing to trust them, by a collection of the dicta of judges and legal writers. No attempt will be made here to present the collected decisions or dicta.<sup>2</sup> The problem will merely be discussed briefly from the writer's personal point of view.

In neither of the two great systems of law with which we are familiar are all informal promises enforceable. Courts and lawyers, therefore, must search for the test or tests by which the enforceable can be distinguished from the unenforceable. In the civil law one of these tests parades under the pseudonym of “causa”; in the common law under that of “consideration.” All too readily do we suppose that “the law” on these and other subjects is certain and knowable. All too blithely do we assume that there is only one “correct” definition of terms and one rule of legal sufficiency by which decisions can be tested. In fact the “causa” that in the long history of the civil law made promises binding is an indeterminate and variable quantity.<sup>3</sup> The same is equally true of “consideration.” Anglo-American law did not start with a definition or a rule of legal sufficiency. Instead, we have several centuries full of decisions in specific cases, furnishing at every stage in their progress a new inductive basis for definition and stated rule, an ever changing basis on which all alike are free to build, yesterday, now, and forever. Some rules are more persistent than others. It may be that one such rule is that a promise is not a sufficient consideration for a return promise if it can be affirmatively shown that it is not binding on the one who made it.

(2) Professor Oliphant cites numerous legal writers in *Mutuality of Obligation in Bilateral Contracts* (1925) 25 *Columbia Law Rev.* 705.

(3) Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 *Yale Law Journ.* 621.

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Let us consider the so-called "illusory promise."<sup>4</sup> Suppose that *S* guarantees *P*'s note in return for *C*'s written promise to forbear from suing *P* as long as *C* wishes so to forbear. *C*'s promise is said to be "illusory," and it is said that *S*'s guaranty is not binding for lack of a sufficient consideration. In what does the "illusion" consist; and why is the consideration not "sufficient" (one that along with other facts will be operative to create a legal duty in *S*)?

If *S* asked *C* for that written form of expression he got exactly what he asked for.<sup>5</sup> If *S* had asked for a different form of expression, he would not have received what he asked for. The case would then be determined by the rules of mutual assent and of mistake, not by the definition of a "sufficient" consideration.

Even if *S* got exactly what he asked for and was under no mistake or illusion as to what he got, still the promise of *C* has been described as "illusory." The reason for this is that by the ordinary concept of "promise" the "illusory promise" is not a promise at all. The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for performance arrives.<sup>6</sup> This element is wholly lacking if the expres-

sion is like that of *C* above where he said that he would forbear as long as he wished so to do. The clear meaning of this expression is that *C*'s future conduct is to be in accordance with his own future will, just as it would have been had he said nothing at all. In the absence of mistake as to what was said by *C* there is nothing illusory about this. An "illusory promise" is merely a group of words that lack the principal definitional element of a promise.

It may be that many of the cases holding a seemingly bilateral agreement invalid when one of the expressions is not in fact a promise can be explained on the ground of mistake or lack of mutual assent—the "illusory promise" made was not the promise that was asked for.<sup>7</sup> In some of them the decision is expressly based upon the doctrine of consideration.<sup>8</sup> It is to be observed that in such cases the court is dealing with a unilateral, not a bilateral contract. There is only one promise made;

(4) See my discussion in *The Effect of Options on Consideration* (1925) 34 *Yale Law Journ.* 571, 573 et seq.

(5) Professors Williston and Oliphant (1925) 25 *Columbia Law Rev.* 719, 860, both say that the contractor requests in return "not simply an expression" but an "assurance in fact." What is an "assurance in fact" other than an expression that expresses something? Surely it is not meant to abandon the objective test of contract and make it depend upon the subjective state of mind of either the promisor or the promisee. When a contractor requests a certain "expression," he does not request a word with the tongue obviously in the cheek; in such case he does not get the requested expression. But when two parties sign a written document with numerous terms in specific language, each gets exactly the expression and the "assurance" that he requests, despite the fact that there may be contained only an illusory semblance of a promise by the other party. When he requests this particular written "assurance" he is not asking for a state of mind; he cannot escape contractual duty on the ground that the words mean less than he supposed.

(6) Professors Williston and Oliphant (1925) 25 *Columbia Law Rev.* 719, 860, appear to be in substantial agreement on this. The latter defines promise as "the expression of a volition to set some objective limits to one's freedom of action."

(7) In *Great Northern R. R. v. Witham* (1873) L. R. 9 C. P. 16, the defendant offered to supply all goods that the Railroad might order of him. The Railroad replied promising to buy all that it might so order. This reply contains an "illusory promise," but it was not responsive to the offer. The true response was an order for goods, with its implied promise to pay a specific sum; when such a response came there was an acceptance making a good bilateral contract. *Chicago & G. E. R. R. v. Dane* (1870) 43 N. Y. 240 was decided rather on the ground of lack of proper acceptance than for lack of sufficient consideration. In *Hopkins v. Racine Iron Co.* (1909) 137 Wis. 583, 119 N. W. 301, the defendant promised to furnish castings as ordered. Both parties seem to have thought that this promise was a contract; but the plaintiff made not even an "illusory promise" in return. Prior to acceptance by ordering some castings the defendant revoked its offer and prevented the making of any contract. See also *Stroug v. Sheffield* (1895) 144 N. Y. 392, 39 N. E. 320. Probably most of the cases saying that both parties must be bound are cases where one party gave nothing whatever, not even an "illusory promise."

(8) *Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory* (1921) 231 N. Y. 459, 132 N. E. 148. The court interpreted the buyer's written words as being a promise to buy such glue as it might thereafter order of the defendant. The words were "contract for your requirements of glue for the year 1916," the document being marked "accepted" by the buyer. "The defect . . . is that it contains no express consideration, nor are there any mutual promises from which such consideration can be fairly inferred . . . . The only obligation assumed by it was to pay nine cents a pound for such glue as it might order . . . . Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound." We might differ with the court in its interpretation of the buyer's words and arrive at a different result; but the court rested the decision on lack of sufficient consideration and not on want of mutual agreement. See also *Wickham & -B. Coal Co. v. Farmer's Lumber Co.* (1920) 189 Iowa 1183, 179 N. W. 417: "Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law."

and strictly the case is not within our present subject. But such agreements are usually spoken of as bilateral; and the reasons why the "illusory promise" is not a sufficient consideration are probably identical with those given for holding that a real promise is not sufficient if it can be shown to be not binding.

Why does not the community regard the "illusory" or the non-binding promise as a good reason for using compulsion against the other party? Is it because "in the eye of the law" it has no "value"?

It is doubtful whether the idea of "value" in an economic sense played any large conscious part in the development of the doctrine of consideration. The courts have uniformly refused to go into the question of *relative* values, except to establish fraud or the absence of a bargain in fact.<sup>9</sup> "Value" is determined by the existence of a market; and a bargain in fact proves that one market exists. The value depends upon the appetite of him who buys. The law of consideration is not made to assist the poor buyer in his struggle for life. To some slight degree, however, the validity of a bargain may be determined by extrinsic markets. Possibly a consideration is not sufficient unless there are such extrinsic markets to give it some value. The markets for "illusory" and non-binding promises are no doubt few and weak. Yet it seems never to have been stated that a consideration is insufficient in case no market other than the present buyer can be shown to exist.

Professor Williston agrees that there are considerations having economic value that are nevertheless not legally sufficient to make a return promise binding.<sup>10</sup> Further, he does not assert that considerations, having no economic value are never suffi-

cient. Value in the economic or factual sense not being the test, he falls back upon "legal value," or "value in a technical sense," or "value in the eye of the law."<sup>11</sup> How are we to define "legal" value, or "technical" value or "legal eye" value? It is believed that the only way is to observe the working of the technical legal eye, to list the decisions and thus discover what considerations (some with economic value and some without) have been held to be sufficient. Thus the cart is put before the horse; and instead of "value" determining the decisions, the decisions determine "value." This list of decisions must in any event be made; by them we shall determine what considerations are sufficient, and also (if the matter seems to be of any importance) what considerations have "value in the eye of the law." If they show that non-binding promises have been held to be insufficient consideration, they may also be said to show that non-binding promises have no "legal value"; but they cannot be said to show that they are insufficient consideration *because* they have no "legal value".

In exactly the same way, "detriment" and "benefit" became ineffective in determining the sufficiency of consideration. Since many considerations that were not detrimental or beneficial in any economic or factual sense were held to be sufficient, and others that were admittedly detrimental or beneficial were held to be not sufficient, it became customary to say that the test of sufficiency was "legal detriment" or detriment "in a technical sense" or detriment "in the eye of the law." The very thing we wish to know was what considerations "the eye of the law" looked upon as sufficient, and this can be determined only by an inductive collection of decisions—

(9) As, for example, in *Keller v. Holderman* (1863) 11 Mich. 248.

Of course, the question whether consideration has some "value" is not identical with that of relative values. The law might require that extrinsic markets shall show that a consideration has some value without requiring that they shall show that the exchanged considerations have the same value.

(10) Op. cit., footnote 5, p. 865.

(11) When in *Thomas v. Thomas* (1842) 2 Q. B. 851, Patterson, J., said that "consideration means something of some value in the eye of the law," he said nothing further about "value in the eye of the law" as a test of sufficiency. His main point was that it had to be something "moving from the plaintiff." This point he proceeded to illustrate and apply. Even as to this, his statement is not now prevailing law in the United States. Moreover, the "eye of the law" is notoriously of impaired vision.

the very collection necessary to determine what considerations are "legal detriments" or detriments "in a technical sense" or detriments "in the eye of the law."<sup>12</sup>

It appears, therefore, that if an "illusory" or other non-binding promise is not a sufficient consideration, the rule is not reached by a mere process of deduction from a supposedly general rule that consideration must have "legal value" or be a "legal detriment." Such a particular rule may be a correct one; but its correctness must be shown by an inductive collection of decisions in point. If such decisions exist, it is possible that they may be explained on the ground that the courts regard such a consideration as having too slight an economic value; the general markets for such a commodity are too few and too weak. They may perhaps be explained on the ground that the courts thought the consideration too slight an economic detriment or benefit. Or, they might be explained on some other ground of social policy. It is conceivable that the sufficiency of consideration might be determined by some particular standard of economic value or by some specified degree of factual detriment; but the writer believes that the decisions do not justify the construction of a rule on any such basis.

The only possible generalization, the deductive use of which does not involve a begging of the question, is one that is constructed out of factual elements that in

(12) A similar error could be made in using the term "sufficient consideration." If "consideration" is defined in a purely factual sense (as we define "value," or "detriment" or "benefit"), to wit: "an act, forbearance, or promise requested and given in exchange for a promise," it ceases to denote with exactness one or more of those operative facts that make a contract. Some considerations within the definition will not help to make a contract; and in many sorts of cases an informal contract can be made without any consideration at all. We therefore add a qualifying adjective and say that the only kind of consideration that will help to make a contract is a "sufficient" consideration. Observe, now, that there is not the slightest possibility of determining the enforceability of a promise by the use of this concept deductively. To say that a void promise will not make a return promise binding because the law requires a "sufficient" consideration is a glaring example of begging the question. Its defects are no different in kind, however, from those involved in saying that a void promise is not a sufficient consideration because it has no "legal value" or "value in the eye of the law." It is not the quality of "sufficiency" that causes a court to hold a certain consideration to be "sufficient."

the past have induced courts to act or that a lawgiver declares must induce courts to act. In a new case possessing those factual elements the court's action may be predicted with a moderate degree of confidence but not with certainty.

Professor Williston writes: "The test of 'value in the eye of the law' remained and is in substance the same for both classes of cases—a 'legal' detriment to the promisee or 'legal' benefit to the promisor—something which changes the legal position that the party giving or receiving the consideration occupied prior to the bargain."<sup>13</sup> This sentence suggests a definition, not only of "legal value" and "legal detriment," but also of "sufficient consideration." It is "something which changes the legal position . . ." A definition so worded cannot be relied on.

The consideration in a unilateral contract may be such as to operate *per se* to change the "legal position" of the promisee. When such is the case, this may be an added reason for holding the consideration to be sufficient. Thus, if the promisee releases a mortgage he extinguishes his property interest; if he surrenders or cancels a promissory note, he extinguishes his right to payment; if he rejects an offer, he destroys his power of acceptance; if he hands over a gold piece or a book, he extinguishes his property interest in the chattel. All these performances, changing legal position, are sufficient as a consideration.

A consideration may be sufficient, however, even though it changes not a single legal relation of either the promisee or the promisor. A change or forbearance to change one's *physical* position is quite sufficient; so also, a *forbearance to change* one's legal position (forbearance to use a power) is just as sufficient as is a change therein. If at request, a promisee (having

(13) *Op. cit.*, footnote 5, p. 866. The present writer's objections to "legal detriment" as a definitional term have been stated above. "Legal detriment" has been defined as any act or forbearance not already required by existing legal duty. This does not beg the question; but it does not accurately define "sufficient consideration."

made no promise, tacit or express) plows a field or swims the Hundson or forbears to smoke for a year<sup>14</sup> or forbears to accept an offer that has been made him,<sup>15</sup> he is not changing a single one of his legal relations; and yet all of these are sufficient considerations. From beginning to end of these performances, after the bargain is made and during its making, the performer and the promisor had every right, power, privilege, and immunity that he had prior thereto. If there are any other legal relations not included under the foregoing terms, they too are unchanged.

It has been urged by a few that the time has come to abandon the requirement of a consideration; but the existing decisions show that the courts would not now follow such a rule.<sup>16</sup> It might be urged that a promise should be made binding by any act, forbearance, or promise bargained for in fact as the equivalent of a promise; again, existing decisions do not permit of such a rule. It may be urged that a non-binding promise is sufficient to make a return promise binding, even though the second does not and cannot make the first binding. In determining whether the courts will in fact follow this rule (whether

it is "the law"), we cannot rely upon any "deduction" from some more general rule that a consideration is not sufficient unless it has value (either factual or "legal"), or that a consideration is not sufficient unless it is a detriment (either factual or "legal") to the promisee or a benefit (either factual or "legal") to the promisor. Even though these concepts (especially factual "detriment" and "benefit") may have played a considerable part in the development of the law, they have not so restrained its development that a consideration is not now sufficient unless the requirement indicated by these terms exist. This is shown by modern decisions dispensing with such a requirement. We must start anew, therefore, and construct inductively from the collected decisions down to date a new definition of "consideration," a new definition of "sufficient consideration," and a new rule determining the enforceability of promises. Such a rule may be safe for a decade as a basis for the decision of new cases that appear to fall within its terms. It is certain that new notions will gradually make it more or less unsafe thereafter and that new definitions and rules will be constructed by our successors.

An answer to the question under discussion—whether a promise that itself remains not binding on its maker is generally (or at least in some cases) not sufficient to make a return promise binding—is indicated by the following:<sup>17</sup> (1) The dictum that both parties to a bilateral agreement must be bound or neither is bound is inveterate.<sup>18</sup> (2) Many cases have held that a promise is made insufficient as a consideration if the

(17) The list here made is merely suggestive, not exhaustive.

(18) The writer is quite willing to abandon such a dictum if actual decisions have undermined it, whether intentionally or unintentionally, through ignorance, forgetfulness, or fiction. Many another equally glittering phrase and doctrine has been shown to be a "wind ball that has gone bouncing down the ages." Phelps, *Faistaff and Equity* (1901) 45, 46. Professor Williston appears to be right, however, when he indicates that there is no obvious social demand for the abolition of the rule.

(14) See *Hamer v. Sidway* (1891) 124 N. Y. 538, 27 N. E. 256. If in this case the nephew promised that he would forbear to smoke, and if under the law this promise is binding, he changed his legal position, in that he extinguished his privilege of smoking (undertook a duty to the uncle not to smoke). Even in the case of such a bilateral contract the change in legal position is the result of the contract; the contract is not the result of a change in legal position. But even if the nephew made no promise at all, his actual forbearance as requested would be sufficient consideration; and yet at every moment of such performance, and afterwards too, he remained legally privileged to smoke.

See the excellent statements in *Strong v. Sheffield*, supra, footnote 6, and *Miles v. Alford Estate Co.* (1886) L. R. 32 Ch. D. 266 (per Lord Bowen).

(15) See *White v. McMath* (1913) 127 Tenn. 713, 156 S. W. 470. Likewise, forbearance to make an offer is not prevented from being a sufficient consideration because it does not change one's legal position. *Hopkins v. Ensign* (1890) 122 N. Y. 144, 25 N. E. 306.

(16) It is true that in certain classes of cases the requirement has already long been abandoned, if we accept as the definition of consideration one favored by many writers: "an act, forbearance, or promise requested and given in return for a promise." The many sufficient "past considerations" are by this definition, as Sir William Anson truly says, no consideration at all; and the same is true in those cases holding that subsequent action in reliance on a promise makes it binding even though such action was "no more than a condition or a natural consequence of the promise." *Holmes, C. J.*, in *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397.

promisor reserves an "option to cancel."<sup>19</sup>

(3) There are decisions holding that an "illusory promise" is not sufficient consideration for the reason that it is not binding (and not for the reason that it was not the requested equivalent or that no equivalent was, in fact, requested).<sup>20</sup> (4) If two promises, one of which is void for illegality, are made by A in exchange for one lawful promise by B, it has been said that B's promise is void and not sufficient consideration for the one lawful promise made by A.<sup>21</sup> An exhaustive study of the cases in these fields, along with those in which void and voidable promises are held to be sufficient consideration, is necessary in order to determine the extent to which the rule requiring mutuality of obligation still prevails. A statement of where the rule ends and the exceptions begin is not a simple matter.

ARTHUR L. CORBIN.

Yale Law School.

(19) 1 Williston, Contracts (1920) § 105; Page, Contracts (2d ed. 1922) § 572. The present writer believes that the rule has been applied in cases where it should not have been. See The Effect of Options on Consideration (1925) 34 Yale Law Journ. 471, *passim*. The cases show none the less the attitude of the courts on the problem involved in this article.

(20) See *supra*, footnote 8.

(21) 3 Williston, *op. cit.*, footnote 19, §§ 1780, 1782; Page, *op. cit.*, footnote 19, § 1031. The cases cited as authority for this appear to be doubtful and confused. They involve the distinction between the terms "void" and "illegal" and are much concerned with questions of divisibility. The law appears to be stated *contra* in 13 Corp. Jur. 512, citing many cases unconfirmed by the present writer. See also *Erie Ry. v. Union Loco. & Ex. Co.* (1871) 35 N. J. L. 240, and *Sarco Co. v. Gulliver* (N. J. Eq. 1925) 129 Atl. 399, apparently *contra*.

## NEW AIR COMMERCE REGULATIONS

Under authority of the 1926 Air Commerce Act, the Department of Commerce has promulgated Regulations, effective midnight December 31, 1926, governing the registration, licensing, construction, equipment, flying and practically everything pertaining to aircraft used in interstate commerce. Many salutary limitations on dangerous flying practices are included, and since every airplane not constantly kept within one state will be subjected to these regulations, they will govern practically all airplanes in the United States. A summary of the regulations will be given in an early number.

## EDITORIALS AND COMMENTS

### THE VALUE OF FOREIGN PRECEDENTS

Several recent decisions illustrate the practical value of foreign precedents to lawyers in the United States. The Supreme Court of the United States, on a question of contract law, in *Yankton Sioux Tribe of Indians v. United States*, 47 Sup. Ct. 142, decided November 22, 1926 (see "Digest of Important Decisions," post), quoted from *Stevens v. Webb*, 7 Car. & P. 60, and cited it and *Da Costa v. Davis*, 1 Bos. & P. 242, 126 Eng. Reprint 882, as the chief precedents for the decision. In *Mellon v. Federal Ins. Co.*, 14 F. (2d) 997, decided Sept. 14, 1926, Judge Hand, on a question of marine insurance law, reviewed the American and English cases, and followed the latter, saying:

I have followed the English authorities because I think them right in holding that even in an "all risk" policy, there must be a fortuitous event—a casualty—to give rise to any liability for insurance.

A Canadian decision, *Rex v. White* (British Columbia), 1926, Vol 3, Dominion Law Reports 1, is particularly interesting because a majority of the court approved and adopted the dissenting opinion in a Kentucky case and held contrary to the weight of authority in the United States, while the minority were for following the United States decisions. The case was an appeal from conviction for murder, at the trial of which evidence of trailing of the accused by bloodhounds was admitted. There being no Canadian or English precedent for admission of such testimony, the majority held its admission was error requiring reversal of the conviction. The United States cases were considered, and the reasons for and against admission of such testimony were fully discussed. Martin, J. A., dissented in an opinion in which he not only reviews the United States cases, but also presents a very formidable and interesting array of English and American decisions, which, although not directly in

point, approved admission of testimony as to the habits and conduct of various animals. His opinion contains a valuable collation of authorities and a good discussion of the relevant principles of evidence.

Now, the point we wish to emphasize is not that the foreign decisions are better than ours, for they are not, nor that some precedent, either local or foreign, is essential in support of every contention or decision: it is that when the average lawyer in the United States engaged in general practice really *needs* persuasive authority, he does not regularly take advantage of the foreign decisions, although the specialist in Patent, Admiralty, Marine Insurance, Contract and Criminal Law *always* does. Do you? We confess that years ago, before Halsbury's "The Laws of England" was published, we did not do so on some occasions when we should have, and the reason was that after exhausting the possibilities of the vast accumulation of decisions in the United States by examination of the few volumes necessary in West's digest, we were discouraged by what in comparison appeared to be the tremendous labor necessary to make anything like an adequate search for a foreign precedent. But conditions have changed. We now have not only Halsbury's encyclopedic text, but also thirty-one volumes of the English and Empire Digest, down to "Landlord and Tenant," covering all English cases from the earliest time, and (except those of merely local importance) the Scottish, Irish, Canadian, Indian, Australian, New Zealand and other British colonial decisions as well. Corpus Juris, A. L. R. and N. C. C. A. cite the foreign decisions and A. L. R. has reported some. In our "Digest of Important Decisions" the English, Canadian and other foreign decisions will be included on the same basis as United States cases where of sufficient general importance.

And if, perchance, as we once heard it complained, the English decision happens to resemble a debate more than an opinion, then that may make it all the more persuasive. Eh, what!

#### UNITED STATES CODE

The new Federal Code created by Act of Congress, approved June 30, 1926, has been printed and may be procured from the Superintendent of Documents, Washington, D. C. The enacting provision is as follows:

*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, that the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the code, evidenced as hereinafter in this section provided, shall establish *prima facie* the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the code in the custody of the Secretary of State.

(c) The Code may be cited as "U. S. S."

The text of the code follows immediately after the foregoing. It is divided into fifty titles, each of which is subdivided into sections, numbered consecutively from 1 to the end of the title. By reason of this it is necessary in citing the code to give both the title and section number, thus: "U. S. C. Title 28; Sec. 41," or "28 U. S. C. 41;" or "U. S. C. 28:41," as usage may determine.

The present edition is a temporary print without index or appendix. This was done to allow for correction of errors before printing the permanent edition, which will also contain in one volume an index, reference tables. The Declaration of Independence, The Constitution, etc.

There has been only one complete revision of the United States Statutes, that

of 1874. The legislation of more than fifty years has accumulated since then, and for several years there has been an organized movement for a new revision. The present code is the result. Under the auspices of the Senate and House Committees, the code was prepared and edited by the West Publishing Co. and the Edward Thompson Co., publishers of U. S. Compiled Statutes, Annotated, and Federal Statutes, Annotated, respectively.

#### EFFECT OF THE CODE

As indicated by the enacting provision, *supra*, the present code does not change or repeal any existing law or enact any new law. It is merely a systematic classification and arrangement of the existing general and permanent laws of the United States as of December 7, 1925, "compiled into a single volume." Its provisions are presumed to be the law—"prima facie" it is the law—but where different from the original enactments, "effect shall be given for all purposes whatsoever to such enactments."

#### CRITICISMS

From the foregoing it will be seen that the code is not a true revision or re-enactment of the laws. It does not supersede or affect the existing law, as did the Revised Statutes of 1874. Whether it should or should not have that effect was the subject of much controversy both in and out of Congress. An article entitled "Legal Status of the New Federal Code," by Frederic P. Lee and Middleton Beaman, appearing in the December, 1926, number of the American Bar Association Journal, gives the history of the present code, including some of the legislative proceedings, and says:

Desirable as it may be that codification of the Federal laws should not result in merely "another volume added to the Statutes at Large," as Mr. Justice Brown stated it, that is exactly what has been done in the case of the code. The result is attributable to the refusal of the Senate to assume the responsibility of passing a bill of such magnitude and having

it absolutely replace the laws of the United States, as was done by the Revised Statutes of 1874. In consequence, it may be concluded that the code differs from a private compilation of Federal Statutes, such as Federal Statutes Annotated, United States Compiled Statutes Annotated, or Barnes Federal Code, only in that it is officially sanctioned, available for a relatively moderate price, and may be offered "in all courts, tribunals and public offices of the United States at home or abroad, of the District of Columbia, and of each State, Territory or insular possession of the United States," as establishing *prima facie* the laws of the United States, general and permanent in their nature, in force Dec. 7, 1925. It follows from this that no change in the law will be effected by an amendment to the code. If law is to be changed by orderly process of express repeal and amendment, the basic statutes as appearing in the Revised Statutes and Statutes at Large must be repealed or amended. It may further be observed that, since the only utility of the code is to form a convenient method of presenting the statutes in force on Dec. 7, 1925, the only result produced by an amendment of the code would be to make it incorrect as a reproduction of those statutes.

The statement that "it follows from this that no change in law will be effected by an amendment to the Code," does not appear to be a necessary conclusion. Such an amendment would apparently indicate the legislative intent to change the existing basic law, and no reasons appear why that intent can not be given effect. Where the Code accurately states the existing law no harm or confusion would result. Only in instances (presumably rare) where the Code is incorrect, should there be any doubt as to the legislative intent, and then only in case the inaccuracy were not observed by Congress. Of course, Acts intended merely to correct the Code so as to make it correctly state the law as of December 7, 1925, can be expressly limited to that effect. The common-law rules of statutory construction are adequate, we have no doubt, to any situation that may arise, and to say that much confusion will result because Congress cannot or will not, in amending the Code, have regard to its inaccuracies, assumes that the Code is much less accurate than even its opponents contend.

Under all the circumstances, the legislative expedient adopted by Congress was at least as good as any other that was suggested.

## FICTION?

Notwithstanding all the truth their clients regale them with, lawyers *do* read fiction. And, more's the pity, careful inquiry proves that they have a peculiar weakness for "shoppy" fiction—stories about lawyers, litigation and the like. The adventures of Caleb Hope, the sententious and ever "lugubrious" lawyer, as told by Clarence Budington Kelland in the Saturday Evening Post, are read, we find, by almost every lawyer who reads any current fiction at all. Thomas McMorrow, too, has a large legal following, while Arthur Train's "Tutt and Mr. Tutt" are as familiar as the lamented "Tom and Jerry." If you must dissipate we'll try to guide you in the approved professional direction, and, as soon as we have completed arrangements with the various publishers for the requisite advance information, notice will be given in these pages of current fiction of especial interest to lawyers. This is not an advertising feature, and only the best will be noticed. Indications of your approval vel non, if not *too* severe, will be welcome.

## UP TO DATE?

There is being offered for sale a single volume dictionary entitled "Baldwin's Century Edition of Bouvier's Law Dictionary," published by The Banks Law Publishing Co., New York.

It has been reviewed in the Yale Law Journal (Dec., 1926), and also in the American Law Review, wherein it is said:

"We believe this dictionary, complete to date in one volume, will soon be found in every law office and library."—(Amer. Law Rev., Nov.-Dec., p. 953).

The volume bears conspicuously the statement that:

"This dictionary is not published by the original publishers of Bouvier's Law Dictionary or their successors."

The title page and preface are dated 1926, and represent that it is "Revised and brought up to date." However, we find, for example, under "United States Courts," references to circuit courts as still in existence, although they were abolished in 1911. Throughout the subject of "Removal of Causes" the federal jurisdictional limit is stated as \$2000, although it was increased to \$3000 in 1911. The discussion of "Bankruptcy Laws" seems to indicate that there is none in the United States, although the present Bankruptcy Act was passed in 1898. Under "Employers Liability Act," foreign and state acts are referred to but the Federal Employers Liability Act is not mentioned, although it was enacted in 1908.

These instances and numerous others would seem to indicate that the revision was not very thorough, to say the least.

## BOOK REVIEW

## CORPUS JURIS, VOLUME 41

In this volume of 1,036 pages the big subject covered is "Mortgages," of which the first 1,503 sections are given. The remaining sections of the text (on "Foreclosure by action or suit," and "Redemption") will appear in Volume 42. The classification of points and the statements of law are of the usual high standard observed throughout Corpus Juris.

"Monopolies," by Wm. A. Martin, and "Money Lent," "Money Paid," and "Money Received," are also presented in this volume.

As in previous volumes, the definitions of the various law terms and words and phrases judicially defined are given in alphabetical order.

The editorial work throughout has been unusually well done.

"Let's see, married men all have better halves, don't they?"

"Yes."

"Then what do bachelors have?"

"Better quarters."—Royal Gaboon.

Daddy did a cross-word,

Daddy won a prize,

Daddy's head has swelled up

More than twice its size.

## RECENT CASES

**ATTORNEY SUSPENDED FOR ILLEGAL COLLECTION METHOD.**—The notice sent by an attorney to delinquent debtors to enforce collection simulated legal process. In the proceeding against him for professional misconduct in so doing, the Supreme Court of Minnesota suspended him from practice for six months. A facsimile of the notice is reproduced in the opinion, *In re Davis*, 209 N. W. 627 (Minn.). The Court said:

"The purpose is evident. It was to simulate legal process. Its purpose was not merely to call the debtor's attention to a debt due, or merely to threaten him, but to give force to the paper by its form and formality, by giving the impression that it was a legal document of importance and something in the way of a proceeding in court. It is evident upon inspection. . . . Nothing resembling the practice will be tolerated. The use of a notice simulating legal process in the collection of debts is wrongful; it cannot be right. The admitted purpose of its use shows its impropriety."

**ASSURED'S FAILURE TO NOTIFY INSURER BARS INJURED PERSON'S CLAIM UNDER POLICY.**—An ordinance of the City of Toledo, Ohio, required operators of motor busses to carry liability insurance, and provided that the insolvency of the person insured would not release the insurer, and that upon return of an execution unsatisfied an action could be maintained by the injured person against the insurer direct "under the terms of the policy." *U. S. Casualty Co. v. Breese*, 153 N. E. 206 (Ohio), was a direct suit against the insurer by a person injured in Toledo by a motor bus and was brought on such a policy, condition B of which required assured to give immediate written notice of accident, and to forward process, pleadings, etc. The assured motor bus operator had failed to give the required notice, and the Ohio Court of Appeals held that this was a bar to recovery by the injured person. The Court, following *Travelers Ins. Co. v. Myers & Co.*, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760, and *Employers Liability Assurance Corp. v. Roehm*, 99 Ohio St. 343, 124 N. E. 223, 7 A. L. R. 182, held that the stipulation for notice was of the essence of the contract, and, in part, said:

"A similar decision was rendered in the case of *Jefferson Realty Co. v. Employers' Liability Assurance Corp.*, 149 Ky. 741, the Court saying,

in the course of the opinion, on pages 747 and 748 (149 S. W. 1011), that it was wholly immaterial whether or not the company was prejudiced by the delay, and that a reasonable compliance with the conditions of the contract relating to notice was indispensable to fix liability. To the same effect is *Phoenix Cotton Oil Co. v. Royal Indemnity Co.*, 140 Tenn. 438, 205 S. W. 128. The Supreme Judicial Court of Massachusetts, in *Lorando v. Gethro*, 228 Mass. 181, 177 N. E. 185, 1 A. L. R. 1374, reached a similar conclusion.

"From the fact that the injured party, Martha Breese, has no rights in this case except such as arise under the policy, construed in connection with the legislation authorizing it, the conclusion necessarily follows that she has no greater rights against the insurance company than were held by Joe Zurawski, the assured, and such was directly held in *Cogliano v. Ferguson*, 245 Mass. 364, 139 N. E. 527.

"In the face of these direct holdings of the Supreme Court, we do not feel at liberty to give any other construction to the terms of condition B in the policy in the case at bar."

**"TRUTH SERUM" TESTIMONY NOT ADMISSIBLE.**—In an opinion filed December 20, 1926 (not yet reported), the Supreme Court of Missouri, in the case of *State v. Hudson*, said:

"It was sought to introduce in evidence a deposition of a doctor residing elsewhere who testified to the effect that he administered to the defendant what he termed a 'truth-telling' serum and that while under its influence the defendant had denied his guilt.

"Testimony of this character barring the sufficient fact that it cannot be otherwise classified than a self-serving declaration, is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its truth-compelling power is distilled.

"Its origin is as nebulous as its effect is uncertain. A belief in its potency, if it has any existence, is confined to the modern Cagliostro who still, as Balsamo did of old, cozen the credulous by inducing them to believe in the magic powers of philters, potions and cures by faith.

"The trial court, therefore, whether it assigned a reason for its action or not, ruled correctly in excluding this clap-trap from consideration of the jury."

## DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

**ACCIDENT INSURANCE**

**Cause of Injury**—Death from milk sickness or alkali poisoning from drinking milk from cows which had grazed goldenrod, is within the terms of a life policy indemnifying against death resulting from the effects of an "injury, through external, violent and accidental cause," even though such cause be considered an infectious disease, the product of a known bacillus. *Buel v. Kansas City Life Ins. Co.*, 250 Pac. 635, **N. Mex.**

**Total Disability**—Whether automobile mechanic, by injury to one of his eyes, was totally disabled, within clause of accident policy, as thereby prevented from doing all substantial acts required of him in his business, held under facts in evidence properly submitted to jury, though he may have occasionally performed some single act connected with the business and pertaining to his occupation. *Provident Life Ins. Co. v. Anding*, 109 So. 670, **Miss.**

**APPEAL AND ERROR**

**Parties**—Where there is joint judgment against defendants, all must join in appeal, or there must be order of severance, or its equivalent, apparent on record of trial court. *Parker v. New England Oil Corp.*, 15 F. (2d) 236, **Mass.**

**BANKRUPTCY**

**Attorneys' Fees**—Though fact that more than one firm of attorneys is required to do work for bankruptcy trustee should be considered in certain cases, unless fees are allowed separately, it should not be considered where either firm could have performed all services required. *In re Wallace*, 14 F. (2d) 534, **Okla.**

**Preference**—Where bankrupt sold part of its business, including lease, within four months before adjudication, under agreement by which purchaser deducted from purchase price rent then due, held, that amount paid by purchaser to lessor in settlement of such rent constituted unlawful "preference," under Bankruptcy Act. *Page v. Watertown Consumers' Brewing Co.*, 218 N. Y. Supp. 74.

—Bankrupt's financial statement shortly after execution of alleged preferential mortgage, showing bankrupt's solvency, held admissible in hearing on trustee's petition to declare mortgage a preference as bearing on question of solvency at such time. *Manly v. Southern Supply Co.*, 14 F. (2d) 273, **Md.**

**Preferred Claim**—Where foreign drawee of draft, on receiving notice thereof, transferred credit from drawer's account to "drafts payable" account, but later dishonored draft because of intervening bankruptcy of drawer, reversed the credits, and remitted to receiver of drawer, held, holder of draft was entitled to preferred claim against estate of drawer for amount of draft, particularly in view of Negotiable Instruments Law. *In re Zimmerman & Forshay*, 14 F. (2d) 527, **N. Y.**

**BILLS AND NOTES**

**Acceptance of Draft**—Draft drawn by agent on principal by authority of principal is equivalent to draft drawn by principal himself, and need not be accepted by drawee. *Bailey v. Triplett Bros.*, 286 S. W. 914, **Tex.**

**Warranty**—The indorsement of a promissory note without recourse, known to the indorser at the time it was indorsed to be subject to a complete defense on the part of the maker for failure of consideration, renders the indorser liable to the indorsee for a breach of warranty. *State Bank of Lehr v. Lehr Auto & Machine Co.*, 210 N. W. 89, **N. D.**

**BONDS**

**Builder's**—Provision of building contractor's bond securing contract between individuals, that principal would "pay all persons who have contracted directly with the principal for labor or materials," held intended solely for owner's protection, and materialmen could not sue thereon. *Maryland Casualty Co. v. Johnson*, 15 F. (2d) 253, **Mich.**

**BROKERS**

**Commission**—Where failure to carry out contract for exchange of properties was due to defendant's wrongful refusal to perform, broker was entitled to commissions from defendant, and also commissions other party did not pay because of defendant's wrongful action. *Chutkow v. Wagman Realty & Ins. Co.*, 248 Pac. 1014, **Colo.**

**Exclusive Agency**—A real estate broker has neither an exclusive right nor agency to sell, even though he is employed for a definite time, unless he is granted one or the other in express terms, and in the absence of such grant the owner may, independent of the broker, sell either through his own efforts or those of another without liability to the broker. *Cantrell v. McLemore*, 249 Pac. 417, **Okla.**

**CARRIERS**

**Contract Requiring Proof of Negligence**—Where contract provided carrier should not be liable unless damage was proved to have been caused by its negligence, shipper assumed burden of proving that damage was caused by carrier's negligence, and, where there was no proof of negligence, shipper failed to prove cause of action. *Gruenwald v. American Ry. Express Co.*, 217 N. Y. Supp. 767.

**Passenger Evicted**—Passenger, evicted from street car without unnecessary force on presenting transfer ticket showing on its face that time limit for transportation had expired, cannot sue for wrongful eviction, but must sue for negligence of company in issuing an improper transfer or failing to furnish convenient cars on which transfer might have been used within its time limits. *Birmingham El. Co. v. Putnam*, 109 So. 890, **Ala.**

**Negligence**—Carrier held to have failed to exercise requisite high degree of care in maintaining woman's cabin on steamship platform with

seats for passengers raised ten inches above aisle. *Kitsap County Transp. Co. v. Harvey*, 15 F. (2d) 166, **Wash.**

#### CEMETERIES

Cemetery corporation's rule limiting interment to Caucasians held part of contract for sale of cemetery lot to Negro, in view of provision therein that premises were to be conveyed and accepted by purchaser subject to rules and regulations. *Forest Lawn Memorial Park Ass'n v. De Jarnette*, 250 Pac. 581, **Cal.**

#### COLLEGES AND UNIVERSITIES

Trust—If donation of money and its acceptance for purpose of building dormitory at State University be construed as creating trust or imposing conditions on use of building, use of it as dormitory for 36 years held a fulfillment of trust and full compliance with conditions, so that building could then be used for other purposes. *Splawn v. Woodard*, 287 S. W. 677, **Tex.**

#### COMMERCE

Interstate — Carpenter repairing railroad watchman's shanty at street grade crossing, used to shelter watchman and tools of track gang, held not engaged in interstate commerce, and injury to him was compensable under state statute. *Kloehyn v. New York Cent. R. Co.*, 218 N. Y. Supp. 207.

Tobacco Advertisements — Utah statute prohibiting publication of advertisements relating to tobacco in any form held invalid as undue interference with interstate commerce, as applied to a cigarette advertisement published by state newspaper circulating in several states constituting interstate commerce, since sale of cigarettes in Utah under certain restrictions is lawful, and when shipped into state in original packages are also protected from interference by state. *State v. Salt Lake Tribune Pub. Co.*, 249 Pac. 474, **Utah.**

#### CONTRACTS

Impossible of Performance — Where promises are in the alternative, the fact that one of them becomes impossible of performance, does not relieve promisor from performing the other. *Yankton Sioux Tribe of Indians v. United States*, 47 Sup. Ct. 142, **U. S.**

#### CORPORATIONS

Meeting — An oil and gas lease, executed by officers of a corporation under authority given at an informal meeting of resident directors, acting in accordance with long-established custom, two of the directors being nonresidents and seldom visiting the state, held valid and binding on the corporation. *Forrest City Box Co. v. Barney*, 14 F. (2d) 590, **Ark.**

Notice — That corporate depositor delegated to its secretary alone duty of checking bank's statements, and he acted in his own interest in drawing checks, paid contrary to two-signature instructions, and in not disclosing true state of account to other officers, did not affect his authority to bind corporation, so that delivery of passbook, statements, and canceled checks and vouchers to him was notice to company, in absence of showing that bank or its officers were parties to bad faith. *Calvin Coal Co. v. First Nat. Bank of Bastrop*, 286 S. W. 901, **Tex.**

#### CRIMINAL LAW

Argument — In trial of Negro for murder, prosecutor's argument to jury: "Look at the

crowd, the large crowd of people attending this trial. They did not come here for idle curiosity. A verdict of guilty as charged would meet with their sentiments and deter Negroes from the commission of other crimes," held not prejudicial error. *State v. Thomas (La.)*, 109 So. 819.

Evidence — Trailing by bloodhounds not admissible. *Rex v. White, (British Columbia)*, 1926. Vol. 3 Dominion Law Reports 1.

— Testimony that assured, after being given "truth-telling serum," and while under its influence denied his guilt, is not admissible. *State v. Hudson (Mo. Supreme Court, Dec. 20, 1926, not yet reported).*

Former Jeopardy — Statute permitting justice of peace in same proceeding to determine whether he will sit in capacity of trial court or committing magistrate after evidence is heard, and, if punishment he is empowered to impose is inadequate, to proceed as committing magistrate, is constitutional and does not put defendant, found guilty by justice and bound over to superior court because of inadequacy of punishment in justice court, in double jeopardy. *State v. Friedlander*, 250 Pac. 453, **Wash.**

#### DEATH

Evidence — Testimony as to physical disability or ill health of father suing for death of minor daughter was admissible. *Wright v. Broadway Department Store*, 250 Pac. 572, **Cal.**

#### DESCENT AND DISTRIBUTION

Disqualification — Husband, killing wife to secure her property, may not have property from her estate set over to him in lieu of homestead and exemptions, under statute, because this would be contrary to justice, good conscience, morals and maxims of common law. In re *Tyler's Estate*, 250 Pac. 456, **Wash.**

Shares of Stock — Property consisting of shares of stock in Mississippi corporation, owned by person domiciled in Minnesota at time of death, has its situs in Mississippi, and distribution is controlled by Mississippi Law. *Ewgin v. Warren*, 109 So. 601, **Miss.**

#### ELECTIONS

Primary — The provision of the primary election law that vacancies occurring after the holding of a primary may be filled by the proper party committee applies only to vacancies in nominations actually made at the primary. *Koehler v. Beggs*, 250 Pac. 268, **Kan.**

#### FEDERAL COURTS

Jurisdiction — Amendment to complaint after removal of cause for personal injuries to federal court, electing that case should be governed by Louisiana Workmen's Compensation Act, held not to defeat jurisdiction of federal court. *Texas Pipe Line Co. v. Ware*, 15 F. (2d) 171, **Ark.**

#### FIRE INSURANCE

Mortgage — Where sole purpose of mortgage foreclosure suit was to place record title in mortgagor's wife to defeat lien claim against mortgagor, under agreement that mortgagee would continue original loan, mortgagee's interest and liability of fire insurer under mortgage rider was preserved. *Westchester Fire Ins. Co. v. Norfolk Building & Loan Ass'n*, 14 F. (2d) 524, **Nebr.**

Two Families—Fire policy on household goods held not invalidated because of two-family occupancy of building in which goods were located, where insurer issued and transferred policies with full knowledge of that fact, it being immaterial that insurer might have been entitled to a larger premium under two-family occupancy. *London Assur. Corporation v. Martin*, 286 S. W. 913, Tex.

#### LANDLORD AND TENANT

Injury by Elevator—Owner retaining control of basement elevator used in common by tenants is liable to pedestrian, injured by tenant's negligent operation, notwithstanding tenant disregarded owner's instructions as to guarding sidewalk opening. *Bardel v. Standard Oil Co.*, 218 N. Y. Supp. 36.

#### LIBEL AND SLANDER

Privilege—Newspaper publication of defamatory allegations contained in a complaint filed in suit for damages, but which had not been acted upon, held privileged as fair and true account of judicial proceeding. *Campbell v. N. Y. Evening Post (N. Y.)*, 76 N. Y. Law Journal 1023.

Privilege—A defamatory statement made in the course of a privileged communication about a person outside the privilege, is privileged if relevant to the main communication. *Knapp v. McLeod (Ontario)*, 1926, Vol. 2 Dominion L. R. 1083.

#### LIMITATION OF ACTIONS

Fraud or Malpractice—Complaint alleging that dentist negligently permitted extracted tooth to go down patient's throat and lodge in her lung, his concealment thereof, and plaintiff's discovery thereof about three years later, held to state cause of action for malpractice, governed by two-year statute of limitation and not action for fraud, accruing at time of discovery of fraud, governed by six-year statute limitation in absence of allegation that dentist knew tooth was lodged in lung, or of actual fraudulent misrepresentations. *Tulloch v. Haselo*, 218 N. Y. Supp. 139.

#### LIVERY-STABLE AND GARAGE KEEPERS

Lien for Storage—Where police did not claim expenses for impounded automobile placed in public garage and unconditionally surrendered claim check to car owner, garage keeper had no lien on automobile for storage charges, in absence of statute creating lien and in absence of contract with owner thereof. *Rickenberg v. Capitol Garage*, 249 Pac. 121, Utah.

#### MASTER AND SERVANT

Contributory Negligence—Where printed instructions that gas-driven car would pass train at B. were permanent, there could be no recovery, under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for death of its conductor, because station agent failed to deliver message to hold gas car, where conductor gave signal to start it contrary to order, and it collided with train. *Caldine v. Unadilla Valley Ry. Co.*, 217 N. Y. Supp. 705.

Injury to Third Person—Express company held not liable to plaintiff injured by negligence of company's driver while aiding driver in unloading another's truck at driver's unauthorized invitation, and that accident happened on street is immaterial. *Bernhardt v. American Ry. Express Co.*, 218 N. Y. Supp. 123.

Laundress Injured—Petition alleging necessity by servant, in performance of her duties, to descend stairway, and that defendant negligently failed to provide electric bulb to light stairway, leaving it in dark condition, which caused plaintiff to miss her footing, held sufficient to charge defendants with negligence in failing to provide a reasonably safe place to work. *Eaton v. Wallace*, 287 S. W. 614, Mo.

Negligence—Under Federal Employers' Liability Act switchman who used handle of box car door to raise himself to look into the car and was injured, because handle was defective, could not recover, since handle was designed for opening and closing door. *Campbell v. Southern Pac. Co.*, 250 Pac. 622, Ore.

#### MOTOR VEHICLES

Brakes—Requirement of two independent brakes is complied with where there is a hand brake and a foot brake, even though both work on the same drum. *Bown v. Wilson (English)*, 1926, 162 L. T. 410.

Evidence—Presumption that operator was in owner's service or was using car with permission was not conclusively rebutted by owner's uncontradicted testimony to contrary; credibility being for jury. *Glasgow v. Weldt*, 218 N. Y. Supp. 115.

Injury to Guest—Gratuitous guest of automobile driver, who knew of host's inexperience in driving, cannot recover for injuries caused by skidding, resulting from quick instead of gradual stop on deflated balloon tire on graveled road, since guest accepted car in condition in which she found it and driver with limited skill. *Cleary v. Eckart*, 210 N. W. 267, Wis.

Negligence—Res Ipsa Loquitur doctrine applies to accident caused by automobile leaving road without apparent cause. *Long v. McLaughlin (British Columbia)*, 1926, Vol. 3 Dominion Law Reports 1918.

Pleading—Averment that "it became necessary for plaintiff to veer his automobile to the right to avoid," collision with defendant's car, whereby plaintiff drove into a ditch, held not pleading of mere conclusion or to show that plaintiff was author of own misfortune. *Jones v. Colvard*, 109 So. 877, Ala.

#### MUNICIPAL CORPORATIONS

Zoning Ordinance—Zoning ordinance, prohibiting garage proprietor from enlarging garage in part of block zoned for residences, held unreasonable, where large part of nearby property was zoned for business. *Myslivec v. Bigelow*, 134 Atl. 551, N. J.

#### NEGLIGENCE

Invitee—What plaintiff regularly did on defendant's premises being to their mutual benefit, picking up grains and sticks from the track for herself and keeping places clean, she must be considered an invitee rather than mere licensee, relative to care owing her. *Fleischmann Malting Co. v. Mrkaeck*, 14 F. (2d) 602, Ill.

Res Ipsa Loquitur—Relatives of dead, visiting crematorium, which was open to public, were there on implied invitation, and doctrine of res ipsa loquitur applied to fall of marble vault slab. *Gillilan v. Portland Cremation Ass'n*, 249 Pac. 627, Ore.

**PARTNERSHIP**

**Executions Against Individuals**—Purchaser of partnership property sold under execution against individual partners obtained only interest which individual partners might have in surplus remaining after payment of firm debts and settlement of accounts, and title to property remained in firm. *Rogers v. Landers*, 218 N. Y. Supp. 98.

**PERPETUITIES**

**Bequest**—Where testatrix left income from trust to living granddaughter with power of appointment as to principal, discretionary provision of latter's will bequeathing income for life to her adopted daughters, born after first testatrix's death, with unexpended income to cousins, held void, within rule against perpetuities. *Bundy v. United States Trust Co.*, 153 N. E. 337, **Mass.**

**RAILROADS**

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The abbreviations used (other than conventional) are as follows:

Am.—American.

B.—Bulletin.

C. L. J.—Central Law Journal.

J.—Journal.

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